

# PROCUREMENT LAW AS IT APPLIES TO PUBLIC PRIVATE PARTNERSHIPS

## 1. Introduction

Many readers will be familiar with the much heralded introduction of public private partnerships (PPP's) in Ireland. PPP's are seen as a potential spur to the economy. Many large scale infrastructure contracts are being put out to tender by the Irish Government such as the Luas line and the Metro in Dublin, educational infrastructure projects and for bypass roads and motorways that are currently under construction throughout the country.

But what of the legal procedures for practitioners involved in the PPP tendering process and the influence of European law on such procedures. This is governed by a well established European legal framework in respect of procurement of public contracts which has been fully implemented in Ireland. Many practitioners whether advising public utility bodies or suppliers who submit tenders for the PPP process should have a working knowledge of the EU public procurement rules.

The purpose of the European Union's public procurement policy is to attain fair and open competition for public contracts above certain thresholds, by allowing suppliers to gain the full benefit of the single market and contracting authorities to choose from a more competitive and wider range of bids. Transparency and equality of treatment are two important elements in the European public procurement process.

The E.U. regime provides for a regulated tendering exercise within strict timetable constraints preceded by formal advertisement throughout the E.U. Slightly different rules apply for each of the different types of procurement (works, supplies and services) and further differences occur due to the availability of three different contract award procedures (the open, restricted and negotiated procedures, see below).

The foundation of European Community law relating to public procurement rules can be found in the Treaty of Rome 1957, notably in those provisions which guarantee the free movement of goods, services and capital, establish fundamental principles (equality of treatment, transparency and mutual recognition) and prohibit discrimination on the grounds of nationality<sup>1</sup>. In addition, Article 163 guarantees that the Community support co-operation among undertakings, research centers and universities, inter alia to exploit the internal market "in particular through the opening-up of national public contracts".

Much of this Article looks at the application of the public procurement rules to the PPP process. PPP's can be defined as "arrangements between the public and private sector for

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<sup>1</sup> See Article 12; Article 28 et seq.; Article 43 et seq. and Article 49 et seq. of the Rome Treaty.

the delivery by the private sector of certain public infrastructure and/ or public services, which traditionally would have been provided by the public sector”<sup>2</sup>.

PPP’s involve a genuine transfer of risk from the public sector to the private sector and allow state authorities to draw upon economic resources which otherwise would not have been available to them. As increased deregulation becomes more common in Ireland and European finding of services is set to decrease, public private partnerships are a cost effective method of offering high quality products and services to the public while simultaneously providing a more flexible approach to the support of capital investment in economic and social infrastructure.

## **2. The Influence of European Law**

### **EU Public Procurement Directives**

The Treaty provisions were rendered more effective by a series of detailed secondary legislation in the form of European Directives. Ireland does not have any binding domestic public procurement code and as such it relies upon the implementation of these Directives, by way of corresponding Statutory Instruments:

- **The Public Services Contracts Directive** - Council Directive 92/50/EEC **(applicable to Services Contracts)**  
Implemented in Ireland - European Communities (Award of Public Services Contracts) Regulations 1993 (SI No. 173 of 1993);
- **The Public Supplies Directive** - Council Directive 93/36/EEC **(covering Contracts for the purchase or hire of equipment and goods)**  
Implemented in Ireland - European Communities (Award of Public Supply Contracts)(Amendment) Regulations 1994 (SI No. 292 of 1994);
- **The Public Works Directive** - Council Directive 93/37/EEC **(covering construction and engineering works)**  
Implemented in Ireland - European Communities (Award of Public Works Contracts)(Amendment) Regulation 1994 (SI No. 293 of 1994);
- **The Utilities Directive** - Council Directive 93/38/EEC **(applies to “utility” companies operating in the sections of water, energy, telecommunications and transport sectors)**  
Implemented in Ireland - European Communities (Award of Contracts by entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1995 (SI No. 51 of 1995); and
- **The Remedies Directive** - Council Directive 89/665/EEC **(covers review procedures of procurement notes)**

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<sup>2</sup>State Authorities (Public Private Partnership Arrangements) Bill 2001, explanatory memorandum, p.1.

Implemented in Ireland - European Communities (Review Procedures for the Award of Public Supply and Public Works Contracts) Regs, 1995 (SI 104/1993).

A further Public Procurement Directive 97/52/EC was adopted by the European Parliament and the Council of the European Union on the 13<sup>th</sup> October 1997. This was implemented in Ireland by the European Communities (Award of Public Services Contracts) Regulations, 1998 (S.I. No. 378 of 1998); the European Communities (Award of Public Supply Contracts) (Amendment) Regulations, 1998 (S.I. No. 379 of 1998); and the European Communities (Award of Public Works Contracts) (Amendment) Regulations, 1998. This Directive amended in different ways the Services Directive 92/50/EEC, the Supplies Directive 93/36/EEC and the Works Directive 93/37/EEC. The most relevant amendments were made in respect of procedures concerning the award notices, discrimination, debriefing requirements, disclosure, withholding information, and time limits.

## **2.1 Utilities Directive**

The Utilities Directive covers contracts involving water, energy, transport and telecommunications and is concerned with those contracting authorities operating in the four sectors, water, energy, transport and telecommunications. Contracting authorities in these sectors largely operate in a commercial or quasi-commercial manner. In Ireland, the main bodies whose contracts are covered are the semi-State organisations and Local Authorities operating in these four sectors. Provisions in the Utilities Directive resemble those of the main Directives but they do allow for more flexible procedures as a result of the commercial nature of the bodies in question.

## **2.2 Remedies Directive**

The Remedies Directive covers review procedures of procurement rules and is aimed at ensuring that review procedures are made available to any potential or actual tenderer for a contract who has been, or risks being, harmed by any infringement. These powers of review have been translated into statutory instruments in Ireland. For example, according to regulation SI No. 104 of 1993 implementing the Remedies Directive, the High Court has the power to review the award of a contract and does have the power to award certain remedies including: (i) declaring that a contract is void; (ii) order that the contract be varied; and/or (iii) award damages to any person who is harmed by an infringement of the public procurement rules. The European Commission also has the power to request an explanation from a Member State on any contract procedure in which it considers there has been a breach of Community procurement rules. The Member State has 21 calendar days in which to confirm that the breach has been either corrected; or give reasons why it has not been; or inform the Commission that the award of the contract has been suspended.

## **2.3 Public Services, Supplies and Works Directives**

The Public Services Contracts Directive covers contracts for public services which means contracts in writing between a service provider and a contracting authority for the provision of a public service.

The Public Supplies Directive covers contracts in writing for the supply of public products involving the purchase, lease, rental or hire purchase, with or without the option to buy of products between a service provider and a contracting authority.

The Public Works Directive covers public works contracts which are defined under Article 1 of the Public Works Directive as contracts which are concluded in writing which have as their object “either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work”. A work is defined as the outcome of building or engineering works taken as a whole that is sufficient in itself to fulfill an economic and technical function.

## **2.4 Supplies, Services or Works?**

It is not always easy to say which of these three Directives apply to a particular contract. Many PPP’s may involve contracts which may be multi-faceted incorporating elements of public works, supplies and services. For example, if the contract involves an operational element, such as a contract for the construction of a public transport system which involves the operation of the service after its construction, it could invariably be classified as both a services and supplies contract. As a result this renders the procedure less than clear.

For a supply and services contract the “relative value” of each element is the determinant. Therefore one should apportion the value of the contract between the different elements and the element with the highest value will indicate which of the Supplies or Services Directives will apply.

The works and services Directives do not give any indication in such circumstances which of the Directives should apply. For example, a PPP project for the construction of a clubhouse for a municipal golf course would involve elements of works (for the building) and services (involving the maintenance and running of the clubhouse). In this instance it is necessary to examine the main object of the overall contract as decided in the case *Hotelera International*<sup>3</sup>.

It is possible that a PPP could be structured as a service contract and still be classified as a works or supplies contract. It is important to note however that the procedural requirements for works, supplies or services contracts under the Directives are quite similar and so the categorisation of a contract is not necessarily as critical as one might think.

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<sup>3</sup> C-311/92 of 19 April 1994.

## 2.5 Contracting Authorities subject to the Public Sector Directives

Each of the Services Directive, the Supplies Directive and the Works Directive apply to “contracting authorities” which are defined as:

“...the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law”<sup>4</sup>

The Regulations apply to contracts awarded by the public sector in a wide sense. They apply not only to central government departments and local authorities but also to “bodies governed by public law”. The latter includes any organisation which is established to meet the “needs in the general interest”, has legal personality and which is principally financed, supervised and appointed by the State or other public authorities.

The definition of contracting authorities has been considered by the ECJ<sup>5</sup>. In the *Coillte* case<sup>6</sup> a dispute arose as to whether the Irish Forestry Board, which failed to tender the award of two public supply contracts, came within the meaning of a contracting authority. *Coillte* was established by the Forestry Act, 1988 and is a private undertaking subject to the Companies Acts. Its day-to-day business was managed independently of the State and the State had very little influence in the award of public contracts. The ECJ referred to its decision in *Beetjes*<sup>7</sup> and determined that the term “contracting authorities” should be interpreted in functional terms. It emphasized that there was no provision expressly to the effect that the State control was to extend to the awarding of public supply contracts by *Coillte*, and that the State might exercise such control at least indirectly. It held that *Coillte* was entrusted to provide a service of managing the national forests and also providing certain facilities in the public interest. It held that the state had the power to appoint the head officers of the Company and could exercise control over its economic activity. As a result, it decided that *Coillte* did come within the meaning of a “public authority whose public supply contracts are subject to group control by the state”<sup>8</sup>. Although this decision has been criticised<sup>9</sup> and the dissenting opinion of the Advocate General Alber is considered to be preferable, it is an indication that a wide interpretation of the term “contracting authority” may be adopted by the Court.

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<sup>4</sup> Article 1(b) of the Services Directive, Council Directive 92/50/EEC. There is a non-exhaustive list of such bodies in Ireland set out in Annex 1 to the Works Directive 71/305/EEC.

<sup>5</sup> Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] E.C.R. 4635 and Case C-44/96 *Mannesmann Anlagenbau Austria v Strohal Rotationsdruck GesmbH* [1998] E.C.R. 1-73.

<sup>6</sup> Case C-306/907 *Connemara Machine Turf Co. Ltd. V Coillte Teoranta* [1998] E.C.R. 1-8761.

<sup>7</sup> Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] E.C.R. 4635.

<sup>8</sup> Point VI of Annex I to Directive 77/62/EEC.

<sup>9</sup> See Collins, “Contracting Authorities under the Public Procurement Rules” (1999) 4 *Bar Review* 385.

## 2.6 Thresholds

Before the award of contracts is effected by the procurement (Directives) their value of the contracts must exceed the following thresholds effective 1<sup>st</sup> July 2002 as follows:

- **€ 6,242,028 for works contracts** awarded by Government Departments and Offices, Local and Regional Authorities and other public authorities
- **€ 162,293 for supplies and services contracts** applying to Government Departments and Offices
- **€ 249,681 for supplies and services contracts** applying to Local and Regional Authorities and public bodies outside the Utilities sector.

## 2.7 The Procedural Requirements

### 2.7.1 Types of Service Contracts

There are two types of services listed in the Directives which apply to contracting authorities Part A services are considered as priority services capable of leading to cross border competition and are subject to the full set of procurement rules. Part B services are the services which are subject only to the rules on technical specifications and post award notices but are exempt from other procedural requirements. PPP projects may be a combination of Part A (e.g. Computer sewage/refuse disposal) and Part B (e.g. recreational, cultural and sporting services). In this instance, the full set of procurement rules will apply if the Part A services relative value is more than the Part B services portion of the arrangement.

The categories of services to which the Regulations apply are set out in Schedule 1 of the Directive, which is divided into two parts: Part A and Part B. The Regulations provide if the contract is a Part B services contract then although technical specifications must be drawn up in terms of European specifications as far as possible, and an award notice must be published, there is no requirement to use the open, restricted or negotiated procedures set out in the Regulations.

**Table 1 – Examples of Part A and Part B Services**

<b>Part A Services</b>	<b>Part B Services</b>
<b>Examples</b>	<b>Examples</b>
Land Transport	Rail Transport
Maintenance and Repair	Water Transport
Telecom Services	Security Services
Financial Services	Legal Services
Computer (IT) Services	Education Services
Architectural and engineering services	Health and social services

Management Consultancy	Recreational, cultural and sporting services
Advertising Services Management	Other services
Building-cleaning/property	
Sewage/refuse disposal	

### 2.7.2 Tendering procedures

The Directives established a framework whereby the tendering of certain projects could be carried out. The EU Directives recognise three tendering procedures:

- **Open** - everyone considered;
- **Restricted** – a short list made out of all interested parties; and
- **Negotiated** – the contracting authority negotiates with the suppliers of its choice.

Under the open and restricted procedures the authority must choose among bidders on the sole basis of the written tenders that are submitted. The contracting authority discuss the tenders received of all the bidders<sup>11</sup>. In the case of PPP projects, detailed discussions and negotiations with bidders are necessary before deciding on one particular bidder. As a result, awarding authorities should be advised to opt for the negotiated procedure.

Awarding authorities can always choose to opt for the open or restricted procedures, whereas a negotiated procedure may only be used in certain circumstances as laid out in the Directives (see below).

The negotiated procedure therefore is more suitable for PPP projects. There are two types of negotiated procedure:

- (i) **negotiated procedure without prior publication (non-competitive negotiated procedure) capable of use in exceptional circumstances as set out in the Directives; and**
- (ii) **negotiated procedure with prior publication (competitive negotiated procedure) capable of use in certain circumstances.**

Contracting authorities involved in PPP's should be advised that the ECJ interprets the grounds for use of the negotiated procedure very narrowly.

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<sup>11</sup> See the Statement concerning Article 7(4) of Council Directive 93/37/EEC of 14 June 1993, OJ [1994] L 111/114.

In an Opinion on 13 September 2000 addressed to the UK Government,<sup>12</sup> the European Commission reprimanded the British Government for breaking the procurement rules over the use of the negotiated procedure in tendering for the PFI (the English equivalent of PPP's) deal for the redevelopment of the Pimlico School. The Commission stated that the contract did not, as determined by the British government, satisfy the criteria for use of the negotiated procedure, which should be used for a contract of an exceptional nature which, when considering the risks attaching to it, did not permit prior overall pricing. The Commission found that the use of the negotiated procedure should be limited to situations where the existence of any of the three contingencies under the directives enabling the use of the negotiated procedure are concrete and can be proved by the awarding authority. These three contingencies under the Directives being:

- in exceptional cases, when the nature of the works or services, or the risks involved, do not permit prior overall pricing;
- in the event of irregular tenders in response to an open or restricted procedure; or
- when the nature of the service being contracted for, especially in the case of intellectual or financial services, is such that contract specifications cannot be established with sufficient precision to permit a contract to be awarded under the open or restricted procedures.

The Commission went on to point out that the procedure cannot merely cover the situations that involve risks that will normally be implied in any procurement contract. The Commission also decided that the type of works which may fall into this category includes highly innovative and complex works and where there is a possibility of finding archaeological vestiges at the site or where the geological character of the area is particularly unusual. In such cases the authority would be justified in opting for a negotiated procedure. The Commission stated that these circumstances did not apply in the Pimlico School's case and as such it concluded that the negotiated procedure was not permitted.

Following this Commission Opinion of 13<sup>th</sup> September 2000, the use of the most appropriate procedure for PPP projects, being the negotiated procedure, may be subject to doubts.

### **2.7.3 Time Limits**

Minimum time limits are set down for the receipt of tenders in response to the different tendering procedures.

The time limit for receipt of tenders for an open tendering procedure is not less than 36

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<sup>12</sup>The European Commission also sent a "reasoned opinion" to the UK government in respect of another negotiated procedure, which they find has breached the procurement rules, regarding the provision of community facilities in Ipswich.  
See: [http://europa.eu.int/comm/internal\\_market/en/publproc/infr/2k-869.htm](http://europa.eu.int/comm/internal_market/en/publproc/infr/2k-869.htm) for details on the Commission's Opinions.

days (as amended by Council Directive 97/52/EEC) or 22 days if a PIN, containing all available information, is dispatched at least 52 days and not more than 12 months before the call for competition is dispatched.

The time limit is 40 days for receipt of tenders in response to the restricted or negotiated procedures. This time limit may be reduced to 26 days if a PIN is dispatched at least 52 days and not more than 12 months before the call for competition was dispatched.

#### **2.7.4 Advertisement of Public Contracts**

There are three types of Notices which the contracting authority is obliged to publish in relation to the procurement procedures on public contracts.

- (i) the PIN or Prior Information Notice;
  - (ii) the Contract Notice; and
  - (iii) the Award Notice.
- (i) **PIN** - Contracting authorities involved in works contracts are obliged to publish in the Official Journal an annual notice<sup>13</sup>, called a Prior Information Notice<sup>14</sup> (or PIN), setting out what the contracting authority proposes to purchase in the forthcoming year.

For works contracts, contracting authorities are required to publish Prior Information Notices of their procurement plans, if these entail expenditures of € 6,242,028 in any particular works category. For supplies and services contracts, contracting authorities are required to publish Prior Information Notices of their procurement plans, if these entail expenditure of €750,000.

In the event that the contracting authority does not publish a PIN including a project which may arise at a later date and is not included in the original prior information notice then the contracting authority may still proceed with the PPP contract. The advantage to having advertised proposed projects in the Prior Information Notice arises in relation to time limits for receipt of tenders which are reduced when a PIN is published.

- (ii) **Contract Notice** - Where the contracting authority makes it known that it wishes to award a particular contract and invites bids. The notices must be set out according to the models in the Directives.
- (iii) **Award Notice** - This post award notice makes known the name of the person to whom the contracting authority has awarded the contract. Information on the

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<sup>13</sup> This notice appears on the Tenders Electronic Daily ('TED') database which is located at <http://www.echo.lu/ted>.

<sup>14</sup> It is also known as Prior Indicative Notice.

award of a contract must be notified to the Commission not more than 48 calendar days after the award of the contract. These notices are made available to unsuccessful candidates upon request.

The notices appear in the TED (Tenders Electronic Daily).

Contracting authorities should note that when advertising in the Official Journal, the provisions of the Directives, including the format in the Model Notices, must be strictly followed in all cases. It is important to draft the notice properly and it should not exceed 650 words, therefore, although detail should be given in respect of the contract there is a limit as to what can be included. These Notices are set out in the Annexes to the Directives. Any advertising of the contract, in a national publication, prior to its publication in the Official Journal is not permitted.

### **2.7.5 Technical Specifications**

All of the Directives contain similar provisions in relation to technical specifications<sup>17</sup>. The requirement is to use European standards whenever possible and in their absence there is a hierarchy of other standards that may be used, these being international, national and lastly company standards if no others exist.

### **2.7.6 The tenders/negotiations stage**

After candidates have indicated their interest in bidding, the contracting authority can proceed to vet the interested parties. The Directives provide that such testing may be carried out on a review of criteria for qualitative selection. Bidders can be treated as ineligible if they do not satisfy minimum standards of economic or financial standing and technical capacity. The short-listed candidates are then sent invitations to tender. The information in the invitation to tender is similar to that which would be used in the notice for the open procedure. In the case of the restricted procedure, the preferred bidder is chosen from the written tenders submitted and, as with the open procedure, there can be no meaningful negotiations between the parties after the tenders are received.

In the case of the competitive negotiated procedure, the Directives do not specify what form negotiations are to take. However, these will include lengthy discussions and correspondence between the awarding authority and the bidders.

### **2.7.7 Criteria for awarding contracts**

Procurement rules require that contracting authorities must state whether they will accept a bid on the basis of:

- lowest price only; or

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<sup>17</sup> The Supply (93/36/EEC), Works (93/37/EEC) and Services (92/50/EEC) Directives contain the same provisions in relation to technical rules. The Utilities Directive (93/38/EEC) contains similar provisions.

- the most economically advantageous tender (using various criteria such as price, period for completion, quality, after sales service, etc.).

If the contracting authority proposes to apply the latter basis when considering a bid, it must state in the contract documents, or in the notices, which of the criteria it intends to apply to the award and the order of their importance.

It is important to note that these requirements must be followed precisely as a breach of procurement rules is not looked upon lightly by the ECJ. For example in the Harman case, which concerned the House of Commons' Public Works Department appointment of a contractor to supply the windows for the new Parliamentary office building above Westminster Underground station, a UK contractor was accepted for the contract despite a lower bid being submitted by another company, Harman CFEM Facades (UK) Limited. Harman sued for wasted tendering costs, loss of profit that it claimed it would have made on the contract and aggravated and exemplary damages. The Court held that for 100% of the profits to be recoverable the tenderer must show to a high degree of certainty that it would have won the contract. However, in this instance the tenderer had to show that there was a 90% chance of winning the contract<sup>20</sup>. The Court ruled in favour of Harman and awarded them all loss of profits.

## **2.8 Public Works Concessions**

Certain PPP projects fall under the scope of public works concessions and they are treated as separate contracts by the Commission. These types of contracts are dealt with exclusively in the Works Directive. A concession consists of or includes a grant by a contracting authority of a right to exploit the work or works to be carried out under a contract. An example of a public works concession is a contract to construct a Toll Bridge or Road such as the second Westlink Bridge in Dublin.

There was certain ambiguity surrounding the issue of whether the public procurement rules applied to public works concessions. This issue was clarified in a Communication from the Commission in April 2000 entitled, "Interpretive Communication on Concessions under Community Law", in that such projects are subject to the public procurement rules and principles and thus should be followed accordingly.

## **3. Core Principles regarding EU Public Procurement Law**

In addition to the procedures on EU public procurement law contracting authorities should be aware of certain fundamental principles, as laid down in the Rome Treaty<sup>21</sup>, which should be applied in the PPP process and are binding on contracting authorities. The principles include the following:

### **1. Equality of treatment**

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<sup>20</sup> If they could show that they had 70% chance of winning the contract then they would be able to recover 70% of the profits.

<sup>21</sup> See page 1.

The principle of equality of treatment requires that the contracting authorities take all measures necessary to ensure that all tenderers are treated in an equal manner. This means that similar tenderers are not to be discriminated against as being different. Contracting authorities are bound by this requirement and the ECJ interprets this obligation very strictly<sup>22</sup>.

## **2. Transparency**

The contracting authority must carry out the public procurement procedures with a level of transparency. The contracting authority must make its intention to award a contract public. This was decided by the ECJ in the *Unitron Scandinavian* Case that a principle of transparency is to be complied with along with the principle of equality of treatment by the contracting authority.

## **3. Proportionality**

The principle of proportionality, which is well established in European law, requires that any measure required by the contracting authority (under the procurement rules) be necessary and appropriate in the circumstances of the contract. It may not, for example, require candidates to fulfill conditions which are excessive and disproportionate to the subject of the contract.

## **4. Mutual Recognition**

The principle of mutual recognition requires that Member States recognize the products and services offered by candidates from other Member State countries. This includes for example, during the public procurement procedures, the acceptance of equivalent technical specifications, and educational qualifications of another Member State country.

# **4. Proposed Amendments to the EU Public Procurement Directives**

In 1996 a Green Paper entitled “Public Procurement in the European Union: Exploring the way forward”<sup>1</sup>, gave rise to a debate on public procurement rules whereby the Commission found inconsistencies between the Public Procurement Directives. As a result, the European Commission has proposed a threefold objective to be achieved by the amendment of the Public Procurement Directives: modernisation, simplification and flexibility. The modernisation objective is intended to cater for new technologies and changes in the environment. The simplification and flexibility objectives are intended to simplify certain of the procedures which have been criticised as too rigid and complex.

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<sup>22</sup> *Commission v Denmark* Case c-243/89 [1993] ECR I-3353.

<sup>1</sup> 21 COM(96) 583 final of 27 November 1996.

These proposals were set to be implemented by 2002 but they are presently still under discussion at European level. The European Parliament approved the proposed Directives in May 2001<sup>2</sup>.

The are as follows:

1. **the proposal for a Directive of the European Parliament and of the Council on coordination of procedures for the award of public supply contracts, public service contracts and public works contracts<sup>3</sup>; and**
2. **the proposal for a Council Directive co-ordinating the procurement procedures of entities operating in the water, energy and transport sectors<sup>4</sup>.**

For the purposes of this article concerning procurement rules, concentration is centered on the first proposal.

#### **4.1 Simplification - Restructuring and Clarification of the Directives**

- The three Public Sector Directives involving supplies, services and works are to be amalgamated into a single text in order to render the EU public procurement rules more comprehensible and consistent to both the supplier and the buyer. This may have the effect of eliminating the current confusion as to which Directive is to apply to a particular public contract. Several Member States have adopted the same approach in transposing Directives into a single text at national level.
- The structure of the proposed Directive is more user friendly. This means a reduction in the number of Articles, more clearly laid out provisions and each Chapter, Section and Article has a heading for ease of identification by the reader<sup>5</sup>.
- The new provisions are set to logically follow the course of the contract award procedure. There is a strengthening of the provisions relating to award and selection criteria.
- The thresholds provisions are amended. All thresholds are to be expressed in euros and simplified. These are as follows: for works contracts, a single threshold, of €5,300,000 for all contracts and concessions falling under its scope; and for supplies and services contracts, two thresholds, of €130,000 or €200,000. Their application will depend on whether the contracting authority has the status of central or non-central authority.
- A Common Procurement Vocabulary (CPV) is proposed in order to simplify administrative procedures.

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<sup>2</sup> PRES/2001/205

## 4.2 Modernisation - Adapting to a Changing Economy

- The standard procedures laid down by the Public Supply, Services and Works Directives leave very little scope for discussion between the parties during the award of contracts. This inevitably leads to difficulty when contracting authorities are involved in the negotiated tendering procedure. As a result, a new case for the use of negotiated procedures is being introduced, which for particularly complex contracts - permits a “dialogue” between the contracting authority and the various candidates, while ensuring that there is competition, transparency and general compliance with the principle of equality of treatment. In this instance, the Commission proposes to extend the existing negotiated procedure with prior publication of a notice. This will involve the contracting authority publishing a Notice whereby it will choose one of two options in terms of criteria it wishes the candidates to submit, either by way of:
  - (a) normal documentation relating to the candidates including their technical, economic and financial capacity; or
  - (b) in addition to the normal documentation, the contracting authority may request the candidate to submit an “outline solution” including details on how the candidate will meet the requirement needs of the contracting authority.

Following the selection of candidates, the contracting authority may then consult the selected participants to determine which candidate can best fulfill the particular contract. The contracting authority may then invite not less than three candidates to submit formal tenders. There will then be no further negotiations. It is possible that this amendment to the negotiated tendering procedure may lead to a reprieve on the limited scope of the current negotiated procedure and its current strict interpretation by the European Court of Justice. However, as it is intended that this amended procedure be “appropriately supervised”<sup>8</sup>, its scope and effectiveness remain to be seen.

- There is a clarification of provisions regarding technical specifications. This is intended to simplify the lists of standard technical specifications which are currently provided for in the Public Procurement Directives and to bring them into line with each other. These amendments are intended to allow public purchasers to stipulate their requirements in terms of performance levels as well, while safeguarding the European standardisation approach, as reference to the standards will remain an option.

Certain sectors are excluded from the provisions of this new Directive. One such example is the telecommunications sector.

- The introduction of more flexible purchasing techniques in the form of “Framework Agreements” is set to happen on the basis of which contracts can be awarded without complying with all of the obligations of the Directive. This is to allow for more flexibility in terms of the standard form of contracts. Frameworks Agreements are not contracts,

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<sup>8</sup> COM(2000) 275 final/2 2000/0115 (COD), Explanatory Memorandum, 3.7 at p. 8.

but they may be treated as contracts for the purposes of the Directives. They are already provided for in the Utilities Directive. Framework Agreements can be extremely useful for pan-government agreements. They allow small department's to utilize the government's overall purchasing power. They may however be only suitable for PPP projects with cross-border implications.

- The Commission has also placed much emphasis on encouraging public purchasers to tender for contracts by electronic means. It has set a target of 2003 by which time it proposes that 25% of all procurement transactions take place electronically. This is to have an effect on shortening the length of time for the tendering procedures thereby rendering the procedures less onerous.

The proposed Directive appears to deal with many issues concerning the European procurement rules which have been the subject of much criticism. It reflects a willingness on the part of the European Union to cater for the introduction of a more liberal and flexible approach to European procurement rules and the outcome can only be positive for the success of PPP's in Ireland.

### **Irish Legislative PPP initiatives**

Since 1999, PPP Unit's have been set up in the Department of Finance, the Department of Environment and local Government, the Department of Public Enterprise and the Department of Education. The current Government is committed to completing the National Development Plan. This involves a national capital investment of €1.54bn between 2000 and 2006 whereby one of the main elements is to develop the national road network, a particular portion of the investment is to be provided by PPP's. The Irish Government is keen to further accelerate the PPP process in Ireland and to give confidence to investors, contractors and the public. Consequently, the State Authorities (Public Private Partnership Arrangements) Act 2002 was enacted. This legislation is designed to provide certainty in relation to the powers of State authorities to enter into PPP's and to ensure that State authorities possess the appropriate power to enter into joint ventures. The Act also empowers State authorities to form companies for the purpose of a PPP and gives State authorities the legal capacity necessary to contract with the private financiers of public private partnerships.

### **Conclusion**

The European Union's public procurement policy is to attain fair and open competition for public contracts above certain thresholds, by allowing suppliers to gain the full benefit of the single market and contracting authorities to choose from a wider range of bids. Its application is of particular relevance. In addition, there is a willingness on behalf of the Irish Government for the continued development of PPPs in Ireland. There is a new initiative emanating from Europe to facilitate a more flexible and modernised approach to the rigid European procurement rules, that are not to be taken lightly by any contracting authority at present. The extent and effect of these new initiatives, which remains to be seen, should

however contribute greatly to accelerating the status of PPP's beyond the pilot stage in Ireland and into the everyday normal course of business.

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